N. Medicare Contract Appeals (Subpart N)

Subpart N of Part 422 addresses M+C contract determinations. There are three types of contract determinations addressed under Subpart N: (1) a determination that a contract applicant is not qualified to enter into a contract with us under Part C of title XVIII of the Act; (2) a determination to terminate a contract with an M+C organization; and (3) a determination not to authorize a renewal of a contract with an M+C organization. Regarding item (1), above, this type of contract determination likewise applies to service area expansion applications.

As indicated in the June 1998 interim final rule, pursuant to section 1856(b)(2) of the Act, most of what comprises subpart N was drawn from regulations in part 417 governing similar contract determinations involving contracts under section 1876 of the Act. We received nine public comments concerning subpart N of the interim final rule.

Comment: We received one comment on §422.641. The commenter objected to the fact that subpart N, and §422.641 in particular, does not provide for an appeal mechanism when we and an M+C organization disagree over a term of the organization's M+C contract. The commenter believes that because the Federal Acquisition Regulations (FAR) and contract disputes procedure in Subpart 33.2 of that regulation do not apply to M+C contracts,

the M+C final rule should address how these disputes or disagreements will be resolved.

Response: The M+C statute does not contemplate a contract disputes procedure akin to the contract disputes procedure contained in Subpart 33.2 of the FAR. Unlike acquisition contracts subject to the FAR, the terms of M+C contracts are dictated by statute and regulations. M+C organizations have an opportunity for input on the regulations that govern what is included in M+C contracts through the notice and comment process. Ultimately, however, as a matter of Federal administrative law, we are charged with implementing the M+C statute in regulations, and with interpreting and applying its regulations. We attempt, through Operational Policy Letters and other means, to provide guidance to M+C organizations on our interpretations of regulatory provisions, and ultimately, M+C contract terms. In some cases, M+C organizations, or associations representing M+C organizations, have objected to our interpretations of the regulations or to M+C contract terms. In some of these cases, we have taken these objections into account, and we have made modifications. To the extent that an M+C organization remains uncomfortable with the terms of the M+C contract, or of our interpretation of these terms, it ultimately is free not to renew its contract for the following calendar year. We believe that this informal process has worked well, and that there is no need

to create a formalized adjudicatory process for addressing disagreements between an M+C organization and us about an M+C contract issue.

Comment: We received several comments about the terminology used throughout subpart N. In particular, commenters noted that the terms used in describing the two categories of entities to which the subpart applies, that is, entities that hold M+C contracts and entities that apply to become M+C contractors, vary throughout the subpart. For example, §§422.650(c), 422.650(d), 422.656(a), and 422.660 use three different terms to describe contract applicants: "entity," "M+C contract applicant," and "applicant entity." The commenter recommended that we standardize our use of terminology concerning contract applicants.

Response: We agree with the commenter that the varied use of terms to describe contract applicants is confusing and unnecessary. Therefore, we are revising the regulation text throughout subpart N to refer to organizations applying to become M+C organizations as "contract applicants."

Comment: One commenter indicated that in some instances, subpart N refers only to M+C organizations when it presumably should refer to contract applicants as well. For example, §422.648(b) states that we will reconsider a contract determination if the M+C organization files a written request.

Presumably, this provision should likewise apply to contract applicants since we also afford these organizations reconsideration rights under subpart N.

A similar issue exists at §422.656 of the interim final rule. Paragraph (a) discusses giving both the M+C organization and the contract applicant written notice of the reconsidered determination, while paragraph (b)(1) refers only to the M+C organization. Paragraph (b)(3) returns to using both M+C organizations and contract applicants.

Response: We agree with the commenter that contract applicants are also entitled to seek reconsideration pursuant to a Medicare contract determination. Thus, we are revising §422.648(b) to specify that we will reconsider a contract determination if a contract applicant or M+C organization files a written request for one. We likewise agree that §422.656(b)(1) should be revised to specify that the provision applies to contract applicants as well as existing M+C organizations, and we are making the needed changes to the regulation text.

Comment: One commenter pointed out that subpart N appears to grant different rights to contract applicants than those available to M+C organizations. This is due, in part, to the provision at §422.648(b) that states--in error--that we will reconsider contract determinations for M+C organizations, but not contract applicants. In conjunction with the §422.660 citation

mentioned above, this section indicates that applicant entities must seek reconsideration before requesting an appeal, while M+C organizations can appeal a termination or nonrenewal without first seeking a reconsideration. This too stands in contrast to the provision at §422.662 that contemplates hearings taking place after the initial determination and reconsideration occur.

Response: As mentioned earlier, correcting the language at §422.648(b) to include contract applicants correctly realigns the language in subpart N to convey that applicant entities and M+C organizations must first seek a reconsideration before proceeding to the hearing stage.

Comment: A commenter believes that the language provided at §422.662(b) is confusing, because it appears to indicate that contract applicants who are denied a contract by us must file a request for a hearing within 15 days of the date of the contract determination without first receiving notice of our initial determination.

Response: We agree that the language at §422.662(b) confuses our intent to provide for a contract appeals process that includes--in this order--(1) a contract determination, (2) an opportunity for reconsideration of the initial contract determination, (3) a reconsidered determination, as necessary, (4) the right to a hearing, as applicable, and (5) for contract terminations, a review by our Administrator. We therefore are

changing the language at §422.662(b) to clearly specify that the affected party must file a request for a hearing within 15 days after the date of the reconsidered determination.

Comment: We received one comment on §422.668 regarding the disqualification of a hearing officer. Paragraph (b) of this section states that the person designated to be the hearing officer must consider objections from any party to the hearing that relates to any potential bias of the hearing officer. The hearing officer may then proceed with the hearing or withdraw. The commenter suggested that allowing a hearing officer whose impartiality has been questioned the discretion to continue with the hearing is ill-advised. The commenter asserted that if a party believes that the officer is biased, it would be more expedient to resolve that issue immediately instead of proceeding with the hearing.

Response: We believe that in selecting an individual to serve as a hearing officer, the individual's ability to be fair and impartial would be taken into account. Should there be a suggestion of a possible bias, we believe that such an individual would be in a position to evaluate the situation, and determine whether he or she in fact could be impartial with regard to the case in question. Vesting the decisionmaker with this authority to make his or her own determination, subject to appeal only after the matter is heard on the merits, is the same approach

used with respect to judges in court proceedings, and we believe is appropriate in this context as well. The alternative could permit an appealing party to delay hearings indefinitely by repeatedly challenging the impartiality of the hearing officer and appealing any rejection of such a challenge.

We believe that §422.668 provides an adequate remedy to situations where bias of the hearing officer is questioned. This section states that the objecting party may, at the close of the hearing, present objections, request that the decision of the hearing officer be revised, or request a new hearing before a different hearing officer.

Comment: Commenters noted that §422.692 limits the right to a review by our Administrator to situations involving M+C contract terminations. The commenters questioned whether we intended to deny this level of review in instances in which we nonrenew an M+C contract, or we deny a contract application.

Response: The additional layer of review by our Administrator is intended to apply only to contract termination decisions. This extra level of administrative review was included in the case of termination decisions in order to implement the requirement in section 1857(h)(1)(B) of the Act that M+C organizations have the "right to appeal an initial decision" following a termination decision. In providing for review of a hearing officer's decision by our Administrator, we

have adopted procedures similar to those used for the Administrator's review of decisions of the Provider Reimbursement Review Board found at §405.1875.

Comment: A commenter questioned the provision at §422.696 under which reopening a contract or reconsideration determination is limited to our discretion, the Administrator, or the hearing officer. The commenter asked if the aggrieved party can petition for reopening in any instance.

Response: If an applicant or M+C organization believes it has a basis for re-opening a decision, it may request that the decisionmaker re-open the matter. The decision whether to act on such a request, however, is committed to the decisionmaker’s discretion, and is not subject to appeal or further review of any kind. This is consistent with our general policies on re-opening decisions. See, for example, 42 CFR Part 405, Subpart R.